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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-000489 04/20/2011

HONORABLE J. RICHARD GAMA

CLERK OF THE COURT
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Deputy

ROBERT J HALT, et al. MELANIE C MCKEDDIE

v.

SUNBURST FARMS EAST INC, et al. STEPHANIE MONROE WILSON

ROBERT MACKENZIE
JAMES L SULLIVAN
DAXTON R WATSON

MINUTE ENTRY

Oral argument was held on April 19, 2011 regarding whether the 1985 judgment should be declared void as an illegal private covenant.

Sunburst Farms East, Inc.'s ("Sunburst Farms") Motion for Summary Judgment Regarding the Halt Judgment ("Motion") was taken under advisement following oral argument on April 19, 2011. Sunburst Farms seeks relief from the 1985 Judgment pursuant to Rule 60(c)(6) on the basis that the 1985 Settlement Agreement is an illegal and unenforceable private covenant. Procedurally, Plaintiffs/Counterdefendants Halts (the "Halts") do not dispute that Rule 60(c) relief may be appropriate to vacate a judgment on the basis of invalidity of the underlying settlement agreement. *See Lamb v. Arizona Country Club*, 124 Ariz. 239, 603 P.2d

510 (App 1978). (Response at 5.)[1] Thus, the threshold issue is whether Sunburst Farms' Motion was made within a "reasonable time." Ariz. R. Civ. P. 60(c). The Court finds that it was not.[2]

Procedural Background

In 1984, Sunburst Farms' predecessor-in-interest, Sunburst Farms East Mutual Water & Agricultural Company, Inc. ("SFEM Water"), recorded second amended CC&Rs for the Sunburst Farms community. Three plaintiff-homeowners (the "plaintiffs") filed suit against SFEM Water contesting the validity of the second amended CC&Rs and seeking damages. (C-488397). Summary judgment was entered against SFEM Water. At some point in settlement negotiations to resolve the damages claim, SFEM Water's attorney advised the plaintiffs' attorney:

> [T]here appears to be two problems which we need to consider in order for negotiations to take place. First, I do not believe the Homeowner's Association has the authority to permanently bind the homeowners from amending the CC&Rs of the section in which they live. The second problem is the establishment of the proposition that no homeowner need pay the Association anything.

(7/10/84 Letter from Stephen Williams to James Kemper.) Nevertheless, in April 1985, the parties entered into a Settlement Agreement and Covenant Not to Execute (the "1985 Agreement") in which SFEM Water agreed that the plaintiffs would have judgment against it and the plaintiffs agreed not to execute on the judgment, so long as:

> [SFEM Water] refrains from filing or attempting to file with the Maricopa County Recorder's Office any document regardless of what it may be called which requires any homeowner in Sunburst Farms East Three or Four or Seven to have any form of membership in [SFEM Water] or to pay any amounts of money to [SFEM Water] regardless of what such amounts of money might be called.

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[1] The Halts argue that the *only* way the 1985 Judgment could be set aside is if it were void under Rule 60(c)(4), which Sunburst Farms specifically does not argue here. (Reply at 7.) Further, the Halts argue that Rule 60(c)(6) has no application to what is essentially an action to execute on the 1985 Judgment. *See Daley v. Earven*, 166 Ariz. 461, 463, 803 P.2d 454, 456 (App. 1990). The Court need not address these arguments, however, because of its resolution of the Motion on other grounds.

[2] In so finding, the Court specifically does not rule on the issue whether the 1985 Settlement Agreement is an illegal private covenant under common law. *See generally Riley v. Boyle*, 6 Ariz. App. 523, 434 P.2d 525 (1967); *La Esperanza Townhome Ass'n, Inc. v. Title Sec. Agency of Ariz.*, 142 Ariz. 235, 689 P.2d 178 (App. 1984); *see also Multari v. Gress*, 214 Ariz. 557, 155 P.3d 1081(App. 2007). As to whether the 1985 Agreement violates A.R.S. § 33-440, Sunburst Farms concedes that § 33-440 does not apply retroactively to the 1985 Agreement. (Reply at 7.)

The parties further agreed that, in the event of breach by SFEM Water that would cause the covenant not to execute to be abrogated, "any of the plaintiffs or any of their successors in title may enforce the judgment to be entered in Maricopa County Cause No. C-488397."[3]

In November 2007, Sunburst Farms recorded certain amended CC&Rs for the community (the "2007 CC&Rs"). Shortly thereafter, in January 2008, the Halts, successors-in-interest to one of the 1985 plaintiffs, filed an action to enforce the 1985 Judgment. (CV2008-000489.) Sunburst Farms moved to dismiss, arguing that the Halts waived their rights to enforce the 1985 Judgment when they filed suit against Sunburst Farms in 2004.[4] Judge Miles denied this motion. In April 2008, Sunburst Farms answered, alleging as an affirmative defense that SFEM Water had acted improperly and exceeded its authority in entering into the 1985 Agreement, and that therefore the 1985 Agreement and the 1985 Judgment were not valid.[5] Sunburst Farms also moved for summary judgment, arguing that the Halts were not entitled to execute on the 1985 Judgment because it was not properly renewed and because the Halts had waived such right in 2004.[6] Judge Miles denied both motions,[7] and subsequently set the matter for an evidentiary hearing/trial to the court regarding the waiver of judgment execution issue.

In its Pretrial Memorandum, Sunburst Farms raised four defenses to execution of the 1985 Judgment, one of which was that "the Judgment and the Settlement Agreement from which it arose, constitute an illegal and unenforceable agreement between Plaintiff and the Board of Directors because the agreement eliminated the homeowners' inherent right to amend the CC&R's by a majority vote at any time." (9/19/08 Pretrial Memorandum at 3.) The Halts objected to these defenses being raised for the first time, characterizing them as collateral attacks on the 1985 Judgment and outside the scope of the issue to be tried.

Following a one-day trial to the court in October 2008, Judge Heilman granted judgment in favor of the Halts and thereafter adopted their Proposed Findings of Fact and Conclusions of Law. After post-trial briefing and argument, in July 2009 Judge Heilman appointed Special

[3] Apparently, SFEM Water was no longer represented by counsel at the time.
[4] In 2004, the Halts and others filed an action against Sunburst Farms regarding the validity of the CC&Rs that were at issue in C-488397. (CV2004-002719). That suit was resolved by a 2004 Settlement Agreement between the parties.
[5] Sunburst Farms filed a Counterclaim against the Halts, seeking a declaratory judgment that the 2007 CC&Rs were valid. Sunburst Farms also filed an action against certain homeowners (the "Braden defendants"), requesting the same declaratory relief requested in the Counterclaim. (CV2008-007832.) In July 2008, a group of homeowners (the "Interveners") moved to intervene as Defendants/Counterclaimants in CV2008-00489; Judge Heilman granted this motion in September 2008.
[6] Sunburst Farms made these same arguments in its Response to the Halts' Cross-Motion for Summary Judgment.
[7] Judge Miles did find that the Halts' failure to renew the 1985 Judgment did not preclude them from enforcing the Judgment because the time for enforcement was tolled by the covenant not to execute. (4/23/08 Minute Entry.)

Master Schade to "advise the Court relating to the proper form and documentation of the final Order in this matter." (7/16/09 Minute Entry at 2.) Special Master Schade interpreted this "to mean he shall determine all disputed issues that are proper for him to address with the objective of ending this litigation." (9/24/09 Special Master's Order No. 2 at 2.) One such issue was the Interveners' Motion for Summary Judgment that argued the 1985 Judgment and the 2004 Settlement Agreement were void on their face; in January 2010, Sunburst Farms joined in the Interveners' motion. Special Master Schade disagreed, ruling that the 1985 Judgment and the 2004 Settlement Agreement did not prohibit Sunburst Farms from amending the CC&Rs. "They made it potentially expensive to amend the CC&Rs, but they did not preclude it….It is a novel argument, but it is insufficiently persuasive to void the 1985 judgment and settlement agreement on grounds of jurisdictional defect." (6/1/10 Special Master's Final Report at 56.)[8]

In September 2010, Judge Schwartz ruled on several motions that were then pending, most of which related to the 2007 CC&Rs. In the course of his ruling that the 2007 CC&Rs were valid, Judge Schwartz ruled that the 2004 Settlement Agreement was a private covenant under A.R.S. § 33-440 and therefore was invalid and unenforceable. In November 2010, Sunburst Farms filed the Motion at issue here.

Analysis

Although a court must vacate a void judgment under Rule 60(c)(4) even if the party seeking relief delayed unreasonably, a party requesting Rule 60(c)(6) relief *must* do so within a reasonable time. *Brooks v. Consol. Freightways Corp. of Del.*, 173 Ariz. 66, 71, 839 P.2d 1111, 1116 (App. 1992). The Court has discretion to determine whether a delay is reasonable. *Id*. Rule 60(c)(6) vests power in the Court adequate to enable it "to vacate judgments whenever such action is appropriate to accomplish justice." *Webb v. Erickson*, 134 Ariz. 182, 186, 655 P.2d 6, 10 (1982), *quoting Klapprott v. U.S.*, 335 U.S. 601, 615 (1949).

Initially, Sunburst Farms contends that the time period between 1985 and 2008 should not factor into "reasonable time." Although this argument is appealing at first glance,[9] the court is mindful that the very issue alleged as error—that the 1985 Agreement is illegal because it restricts the right to amend the CC&Rs and its application is not uniform—was raised by SFEM Water's own attorney in 1984. The logical inference is that SFEM Water entered into the 1985

[8] In July 2010, Sunburst Farms and the Interveners jointly moved for reconsideration of the Final Report, arguing in part that the Interveners should be allowed to collaterally attack the 1985 Judgment because SFEM Water "did not defend the action with reasonable prudence," and that the 1985 plaintiffs were on notice that the 1985 Agreement exceeded SFEM Water's authority. (Motion for Reconsideration at 14.)

[9] Regarding Sunburst Farm's argument that the Halts were not entitled to execute on the 1985 Judgment because it was not renewed, the Halts argued that they were not required to do so while the covenant not to execute was in effect, which they assert was until at least 2004, if not 2007. (Response to Motion for Summary Judgment at 2.)

Agreement knowing of the potential underlying invalidity, presumably because the 1985 Agreement was of benefit to it. This is hardly the case where the basis for relief was undiscovered until 2008. The court finds that it would not accomplish justice to essentially exclude this time from its reasonableness determination. *See Webb, id.* Contrary to Sunburst Farms' argument during oral argument, illegality of the 1985 Agreement simply is not akin to an inchoate right that would vest only when this lawsuit was filed. *Cf. Hall v. A.N.R. Freight Sys., Inc.*, 149 Ariz. 130, 140, 717 P.2d 434, 444 (1986) (defense of contributory negligence does not vest until lawsuit is filed).

In any event, Sunburst Farms did not request Rule 60(c) relief within a reasonable time even *after* the Halts filed this action in 2008. Sunburst Farms murkily argues that it did not discover this basis for relief until Judge Schwartz ruled in September 2010 on a similar issue regarding the 2004 Settlement Agreement. (Reply at 8.) The record simply belies any such argument. Sunburst Farms itself raised this issue as an affirmative defense in its Answer filed in April 2008 and again in its September 2008 Pretrial Memorandum. The court finds absolutely no justification for Sunburst Farms to delay until *November 2010*, through two years of tortured litigation over the course of these two consolidated actions, before moving for Rule 60(c)(6) relief. *Cf. Minjares v. State*, 223 Ariz. 54, 61, 219 P.3d 264, 271 (App. 2009) (Rule 60(c)(6) motion filed two months after discovery of basis for relief was timely).

"The provisions of Rule 60(c) were not intended to completely emasculate the sound principle that judgments must at some reasonable point in time achieve finality." *Vander Wagen v. Hughes*, 19 Ariz. App. 155, 158, 505 P.2d 1046, 1049 (1973). As such, Rule 60(c)(6) relief should be given "only when our systemic commitment to finality of judgments is outweighed by extraordinary circumstances of hardship or injustice." *Panzino v. City of Phoenix*, 196 Ariz. 442, 445, 999 P.2d 198, 201 (2000) (quotations and citations omitted); *see Webb, id.* at 186, 655 P.2d at 10 (in "extraordinary circumstances" need for finality must give way). SFEM Water knew of this issue in 1984 and Sunburst Farms knew about it in 2008. The Court does not find that Sunburst Farms' Motion was filed within a reasonable time or that extraordinary circumstances of hardship or injustice compel it to conclude otherwise. Accordingly,

IT IS ORDERED denying Sunburst Farms' Motion for Summary Judgment Regarding the Halt Judgment.

The Halts request an award of their attorneys' fees under A.R.S. § 12-349, arguing that this Motion is merely an attempt to relitigate whether the 1985 Judgment is void on its face, as part of Sunburst Farms' attempt to unreasonably obfuscate these consolidated proceedings. The Court agrees. The issue raised regarding the illegality of the 1985 Agreement is effectively another attack on the 1985 Judgment. The court finds that Sunburst Farms' continuing resistance to the validity of the 1985 Judgment unreasonably delayed these proceedings and was not

supported by a good faith factual or legal basis. *See Larkin v. State ex rel. Rottas,* 175 Ariz. 417, 427, 857 P.2d 1271, 1281 (App. 1992). Accordingly,

IT IS ORDERED granting the Halts' their reasonable attorneys' fees and costs incurred with respect to this Motion, pursuant to A.R.S. § 12-349.

Sunburst Farms East, Inc's Supplement to Oral Argument on Motion for Summary Judgment Regarding the Halt Judgment, filed April 20, 2011 was not considered when making this ruling.

Dated: April 29, 2011

/ s / HONORABLE J. RICHARD GAMA

JUDICIAL OFFICER OF THE SUPERIOR COURT

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Orders 2010-117 and 2011-10 to determine their mandatory participation in eFiling through AZTurboCourt.